MARKED EXHIBIT "HAITI WATER POLLUTION"

MONARCH SHIPPING CO, LTD., in personam, and the M/V MONARCH EMPRESS, in rem, Petitioners, v. UNITED STATES OF AMERICA, UNITED STATES COAST GUARD, and UNITED STATES CUSTOMS AND BORDER PROTECTION AGENCY, Respondents.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
2013 U.S. Dist. LEXIS 152076
CASE NO. 13-80661-CIV-MARRA/MATTHEWMAN
August 15, 2013, Decided
August 15, 2013, Filed

Counsel For Monarch Shipping Co., Ltd, a Bahamian Corporation, as owner of the M/V Monarch Empress, and the M/V Monarch Empress in rem, Plaintiff: Stephen J. Darmody, LEAD ATTORNEY, Darmody Carta, P.A., Coral Gables, FL.

For United States of America, United States Coast Guard, United States Customs and Border Protection Agency, Defendants: Michael A. Dilauro, LEAD ATTORNEY, United States Department of Justice, Torts Branch, Civil Division, Washington, DC; Dexter Lee, United States Attorney's Office, Miami, FL.

Judges: WILLIAM MATTHEWMAN, UNITED STATES MAGISTRATE JUDGE.

Opinion

Opinion by: WILLIAM MATTHEWMAN

Opinion

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court pursuant to an Order of Reference from United States District Judge Kenneth A. Marra. [DE 11]. Before the Court is Petitioners' "Amended Emergency Petition and Motion for Release of the Motor Vessel 'Monarch Empress' or Alternatively, to Fix an Appropriate Bond Amount for the Immediate Release of the Vessel and to Protect the Rights, Liberties, and Freedoms of the Vessel's Crew" [DE 10], filed July 10, 2013 ["Amended Petition and Motion"]. A status conference was held on July 16, 2013. In response to the Petition, Respondents filed a "Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 56 Motion to Dismiss the Petition Seeking Release of the M/V Monarch Empress," [DE 18] to which Petitioners have responded. [DE 28]. The Court held an evidentiary hearing on July 24, 2013, and the matter is now ripe for review. For the following reasons, it is respectfully recommended that the Amended Petition and Motion be **DENIED** and **DISMISSED.**

I. Findings of Fact

The facts here are almost entirely undisputed. On June 5, 2013, the M/V Monarch Empress, an ocean-going "ro ro" vessel ("The Vessel") arrived at the Port of Palm Beach in West Palm Beach, Florida, to deliver cargo and accept cargo for transport to Haiti. [DE 10, p. 6]. The Vessel is of Panamanian registry. [DE 10, p. 6]. Its 17-member crew includes 16 aliens and one U.S. Citizen. [DE 18, p. 7]. On June 5, 2013, each of the aliens was lawfully admitted to the United States under the aegis of an I-95 "Crewman's Landing Permit." [DE 18, p. 7]. Although the alien crewmembers were initially granted permission to land for 29 days, that period has been extended for successive 29 day

periods. [DE 18, p. 7]. Also on June 5, 2013, five United States Coast Guard officers, who were members of the Coast Guard's Marine Safety Detachment at Lake Worth Inlet, boarded the Vessel in order to conduct a port state control inspection. [DEs 10, p. 6 and 18, p. 2].

While conducting the port state control inspection, the officers saw a portable pump in the engine room that was not part of the Vessel's fixed equipment. [DE 18, p. 2]. According to the Coast Guard, the Vessel's Chief Engineer, as well as a subordinate, admitted to Coast Guard personnel that they used the portable pump to decant "bilge water" 2 directly overboard while in a Haitian port. [DE 18, pp. 2-3]. They further admitted that on approximately 30 occasions between mid-2011 and May, 2013, they pumped liquid from the ship's bilges directly into the sea, without first using the ship's oily-water separator system to separate the oil from the water. [DE 20-3, p. 12]. The Vessel is required by international treaty and federal law to maintain an accurate oil record book in which the discharge overboard, or disposal otherwise, of bilge waste is recorded. 3 [DE 18, pp. 4-5].

On June 6, 2013, the Coast Guard again boarded the Vessel and obtained the oil record book and a book that recorded its Global Positioning System ("GPS") positions. [DE 10, pp. 9-10]. On June 7, 2013, the Coast Guard returned to the Vessel and continued its port state control inspection. [DE 10, p. 9]. On that date, the Coast Guard completed its port state control inspection and issued a report. [DE 20-3, pp. 2-4]. The report noted that the Vessel suffered from a number of deficiencies in violation of the International Convention for the Safety of Life at Sea, Nov. 1, 1974, 1184 U.N.T.S. 278, and the International Convention for the Prevention of Pollution from Ships ("MARPOL"), Nov. 11, 1973, 1340 U.N.T.S. 184, and the protocol thereto, Feb. 17, 1978, 1340 U.N.T.S. 61 ("MARPOL Protocol"). [DE 20-3, pp. 2-4].

On June 13, 2013, the Captain of the Port, U.S. Coast Guard Captain C.P. Scraba, on behalf of the Coast Guard Sector Miami, wrote to U.S. Customs and Border Protection ("CPB") at the Port of West Palm Beach and requested that CPB withhold clearance for the Vessel to depart the port, on the ground that the Coast Guard had reasonable cause to believe that the Vessel had violated MARPOL, the Act to Prevent Pollution from Ships ("APPS"), as well as "other criminal and/or environmental laws." [DE 20-3, p. 32]. On that same date, Captain Scraba submitted a letter to the "Master/Agent" of the Vessel that CBP had withheld departure clearance for the Vessel at the Coast Guard's request. That letter read, in its entirety, as follows:

> The Coast Guard has exercised its authority under 33 USC 1908(e) to request the withholding of the clearance, permit to proceed, or permit to depart of the vessel M/V **MONARCH** EMPRESS because on or about June 13, 2013, **MONARCH** EMPRESS, its owners, operators, or person in charge may be subject to a fine or civil penalty under 33 USC 1901 et. seq. and relevant regulations found in 33 CFR Subchapter O.
>
> Customs and Border Protection has withheld departure clearance for the vessel M/V **MONARCH** EMPRESS as required by 33 USC 1908(e), 46 USC 60105, and 19 CFR 4.66a. Clearance may be granted upon the filing of a surety satisfactory to the Secretary, which includes a financial bond and other pledges and promises. The bond amount shall be forfeited if, upon proper notice to the U.S. agent designated to accept service, the owner or operator fails to meet the terms of the surety satisfactory. Any movement of your vessel prior to acceptance of the surety is prohibited except as authorized by the COTP Sector Miami.
>
> The District Seven Coast Guard District Legal Office will coordinate negotiations with the vessel owner and operator to obtain surety satisfactory to the Secretary. Once surety is received, you will be notified so that clearance may be granted to the vessel. Captain James Carlson is your point of contact for this matter. He can be reached at (305) 415-6950.

> I request that you forward this letter to the Owner/Operator of the M/V **MONARCH** EMPRESS or their designated representative. You may appeal the decision to withhold departure clearance or the underlying examination in accordance with the processes set out in 33 CFR 160.7 or 46 CFR 1.03-20, respectively. Should you have any questions or concerns, please contact the legal officer above.[DE 20-3, p. 33].

On June 14, a Staff Judge Advocate for the Coast Guard submitted a "draft" of a proposed Security Agreement to the Petitioners. [DE 10-5]. The Security Agreement included conditions upon which the ship could leave the port, and it contained the following material terms:

> 1. The Owner and Operator of the Vessel would each post Surety Bonds in the amount of $500,000;
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> 2. The Owner and Operator would both agree to "facilitate interviews of any officer or crewmember employed by the Owner or Operator at the time such a request is made by the United States;"
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> 3. Five of the Vessel's officers and crewmembers would surrender their passports and remain within the jurisdiction of the United States District Court for the Southern District of Florida, and the Owner and Operator would both agree to provide reasonable lodging, reasonable transportation within the Southern District of Florida, healthcare coverage, and a meal allowance for these five individuals; and
>
> 4. The United States and the Owner and Operator would all "agree to take reasonable measures to expedite the investigation of the Alleged Violations."

Negotiations over the terms of the Security Agreement ensued, and both the Petitioners and the Coast Guard proposed changes. *See* DE 10-6. On July 1, counsel for the Petitioners sent an e-mail to Coast Guard Lieutenant Jeremy McCall containing suggested edits to the Security Agreement. [DE 10-6]. In the body of the e-mail, counsel for the Petitioners stated, "[r]ather than continue to wrestle over the language of a security agreement, we urge the Coast Guard to immediately release the M/V **Monarch** Empress from what has now turned into eighteen days of arbitrary detention, unsupported by the requisite evidence." [DE 10-6]. The e-mail suggests that the following issues were still in dispute:

> 1. Who constituted the "Operator" of the Vessel;
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> 2. Whether the five officers and crewmembers detained within the Southern District of Florida could work on another **Monarch** vessel within the state of Florida;
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> 3. The definition of "reasonable lodging;"
>
> 4. Whether there should be an obligation not to use immigration status as leverage to obtain testimony from the five officers and crewmembers; and
>
> 5. Whether access to documents would be provided at a time and place convenient to both parties within thirty days of their seizure or creation.DE [10-6].

Negotiations reached an impasse, and on July 3, the Petitioners filed their "Emergency Petition and Motion for Release of the Motor Vessel '**Monarch** Empress' or Alternatively, to Fix an Appropriate Bond Amount for the Immediate Release of the Vessel and to Protect the Rights, Liberties, and Freedoms of the Vessel's Crew." [DE 1]. The Petitioners filed their Amended Petition and Motion on July 10. [DE 10]. In response to the Amended Petition and Motion, Respondents filed their "Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 56 Motion to Dismiss the Petition Seeking Release of the M/V

Monarch Empress." [DE 18]. The Petitioners filed a response in opposition. [DE 28].

Ii. Evidentiary Hearing

In an abundance of caution, and to determine the facts necessary to decide the issues presented, this Court held an evidentiary hearing on July 24, 2013. During the course of the hearing, Petitioners argued that this Court had subject matter jurisdiction over the dispute based on admiralty jurisdiction, federal question jurisdiction under the Administrative Procedure Act, and mandamus jurisdiction. On the merits, Petitioners argued that the Coast Guard did not have reasonable cause to believe that the Vessel had violated the APPS, that there was no evidence to suggest that the Vessel had discharged any oil or oily water while within the jurisdiction of the United States, and that the evidence presented would prove that the entries made in the oil record book were accurate. In opposition, the Respondents disputed jurisdiction and argued that, if the Court were to reach the merits of the case, they should be decided based on the administrative record. The Court heard testimony from the following witnesses:

1. Ms. Cindy Lou Teeters, an administrative employee of **Monarch Shipping**;

2. Lauren Miller, an employee of Penumbra Marine Logistics;

3. David Antonio Motta, Captain of the Vessel;

4. Jose Luis Figuerdo, Chief Engineer of the Vessel; and

5. Felix Valdez Aquino, an oiler on the Vessel.The Court admitted the following exhibits offered by the Petitioners:

1. A supplement to the International Oil Pollution Prevention Certificate ("IOPP Certificate") Form A, issued on July 4, 2011 by Panama Maritime Documentation Services, Inc. (Exhibit 4);

2. The International Oil Pollution Prevention Certificate, issued by Panama Maritime Documentation Services, Inc. on August 8, 2010 (Exhibit 5);

3. An affidavit from Penumbra Marine Logistics (Exhibit 7);

4. A letter from the United States Coast Guard to Cindy Lou Teeters, sent pursuant to 33 U.S.C. 1908(e), regarding withholding of the Vessel's departure clearance (Exhibit 10);

5. An employment contract/boarding letter for Felix Valdez Aquino (Exhibit 11);

6. An employment contract/boarding letter for Juan Carlos Reinoso Rodriguez (Exhibit 13);

7. An employment contract/boarding letter for Cesar Fernando Rodas Urbina (Exhibit 15);

8. An employment contract/boarding letter for David Antonio Motta Ramirez (Exhibit 17);

9. An employment contract/boarding letter for Jose Luis Figueredo (Exhibit 19);

10. The Vessel's visitor's log for various dates in June 2013 (Exhibit 21);

11. The surety bond for release of the Vessel (Exhibit 30);

12. A United States Coast Guard witness/investigator statement form written by Jose Luis Figueredo (Exhibit 35);

13. Handover checklists from the Chief Engineer (Exhibit 42);

14. Oil waste receipts (Exhibit 44); and

15. The Vessel's oil record book (Exhibit 45).The Court also admitted all of the exhibits the

Respondents filed in the following pleadings: United States' Notice of Filing of the Administrative Record [DE 20]; Notice of Witness Designation of LCDR Youngmee Moon, USCG [DE 24]; and Respondents' Notice of Filing Declarations [DE 31].

The Court listened carefully to the witnesses presented by the Petitioners, and carefully examined the exhibits they presented, as well. In summary, the evidence offered by the Petitioners went to show that they had not violated MARPOL or the APPS, had not discharged oily water into the sea, did not fabricate the oil record book, and that they had suffered and would continue to suffer economic loss as a result of the Vessel's inability to leave the Port of Palm Beach. The exhibits offered by the Respondents sought to establish that there was reasonable cause for the action taken by the Coast Guard in this case.

III. Background

a. MARPOL

MARPOL was enacted "to achieve the complete elimination of intentional pollution of the marine environment by oil and other harmful substances and the minimization of accidental discharge of such substances." *United States v. Pena*, 684 F.3d 1137, 1142 (11th Cir. 2012). In *Pena*, the Eleventh Circuit explained that "Annex I [of MARPOL] prohibits a ship from dumping its bilge water into the ocean unless the oil content of that water has been reduced to less than 15 parts per million ("PPM")." *Id.* Additionally, Annex I "mandates that vessels record all oil transfer operations, including the overboard discharge of bilge water, in an [oil record book] that is kept on board and made available for inspection by the 'competent authority' of any government party to MARPOL." *United States v. Ionia Mgmt., S.A.*, 555 F.3d 303, 305 (2d Cir. 2009).

b. The "APPS"

The United States has implemented its treaty obligations under MARPOL and the MARPOL annexes to which the United States is a party through the Act to Prevent Pollution From Ships, 33 U.S.C. §§ 1901-1915 ("APPS"). The APPS prescribes that the Secretary of Homeland Security "shall administer and enforce" MARPOL and related protocols and annexes. 33 U.S.C. § 1903(a). Vessels must maintain an oil record book and record when bilge waste is discharged overboard or disposed of otherwise. 33 C.F.R. § 151.25. "To reduce the oil content to permissible levels, the bilge water must be pumped through a piece of equipment that filters the oil out of the water, commonly called an 'oily water separator.'" *Pena*, 684 F.3d at 1142. "If a ship's bilge water is not filtered through an oily water separator to reduce the oil content to permissible levels, then the bilge water must be collected and retained in tanks on the ship and discharged at a proper facility once the ship arrives in port." *Id.*

The United States Coast Guard is entrusted with enforcing the provisions of the APPS and investigating potential violations. *See* 33 U.S.C. § 1903; 33 U.S.C. § 1907(a)-(b). ("the Secretary [of Homeland Security] shall administer and enforce the MARPOL Protocol"). The Coast Guard may carry out its investigation and enforcement duties by detaining a vessel. 33 C.F.R. § 151.07(b) ("Each Coast Guard official designated as a Captain of the Port (COPT) or Officer in Charge, Marine Inspection (OCMI) or Commanding Officer, Sector Office, is delegated the authority to . . . [d]etain or deny entry to ships not in substantial compliance with MARPOL 73/78 or not having . . . evidence of compliance with MARPOL 73/78 on board.").

If reasonable cause exists to believe that a covered ship, its owner, operator, or other person may be liable for a fine or civil penalty under the APPS, the Secretary of Homeland Security may withhold or revoke clearance for that ship to leave a United States port for a foreign port. 33 U.S.C. § 1908(e); 46 U.S.C. § 60105. 4 The Secretary has delegated this authority to the Coast Guard. 33 C.F.R. §

151.07. Pursuant to the APPS, "[c]learance may be granted upon the filing of a bond or other surety satisfactory to the Secretary [of Homeland Security]." 33 U.S.C. § 1908(e).

IV. Standard of Review

Federal courts are courts of limited jurisdiction. *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 747, 181 L. Ed. 2d 881 (2012). District courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The burden of establishing subject matter jurisdiction rests with the Petitioners. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994).

Petitioners present two separate arguments as to why relief should be granted: (1) Petitioners maintain that the Coast Guard lacked reasonable cause under 33 U.S.C. § 1908(e) to request the withholding of the Vessel's departure clearance at the outset, and, as a result, its clearance should be restored; and (2) Petitioners challenge the terms under which the Coast Guard conditioned the Vessel's release, as reflected in the Security Agreement, asserting that those terms are overreaching or excessive.

V. Jurisdictional Arguments

Petitioners assert four separate bases for subject matter jurisdiction. First, Petitioners claim that this Court has admiralty jurisdiction pursuant to Federal Rule of Civil Procedure 9(h), Supplemental Rules C and E, and 28 U.S.C. § 1333. Second, Petitioners maintain that this Court has jurisdiction pursuant to 18 U.S.C. § 3231, because the APPS is a criminal statute. Third, Petitioners argue that this Court has jurisdiction to review a "final agency action" of the Coast Guard pursuant to the Administrative Procedure Act. Finally, Petitioners argue that this Court has mandamus jurisdiction pursuant to 28 U.S.C. § 1361. In opposition, the Respondents argue that this Court lacks subject matter jurisdiction over the matter and the Petitioners' claims should be dismissed. Respondents also argue that the Petitioners' arguments should fail on the merits.

The Eleventh Circuit has observed that "it is extremely difficult to dismiss a claim for lack of subject matter jurisdiction." *Garcia v. Copenhaver. Bell & Assocs., M.D.'s, P.A.*, 104 F.3d 1256, 1260 (11th Cir. 1997). An attack on subject matter jurisdiction brought pursuant to Federal Rule of Civil Procedure 12(b)(1) can be either facial or factual. *Id.* "Facial attacks on the complaint 'require the court merely to look and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion.'" *Id.* at 1261 (quoting *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990)). 5

a. Admiralty Jurisdiction

Petitioners claim that this Court has admiralty jurisdiction over this matter because the Coast Guard's refusal to grant a departure clearance is tantamount to an arrest of the ship, and arrests are generally reviewable under principles of admiralty law. Accordingly, Petitioners reason, the Court has the power to set a reasonable bond for the Vessel, as it does in other admiralty cases. The Respondents argue that this Court lacks admiralty jurisdiction because the Coast Guard did not arrest the Vessel and instead only arranged to withhold the Vessel's departure clearance in order to preserve its access to evidence and its ability to recoup any fine which may eventually be imposed.

28 U.S.C. § 1333 only applies to "maritime causes of action begun and carried on as proceedings *in rem*, that is, where a vessel or thing is itself treated as the offender and made the defendant by name or description in order to enforce a lien." *Madruga v. Superior Court of California., Cnty. of San Diego*, 346 U.S. 556, 560, 74 S. Ct. 298, 98 L. Ed. 290 (1954). "Arrest of a vessel is an in rem procedure in admiralty law having an ancient lineage. Utilized even before the Elizabethan era, it

had become a dominating feature of admiralty practice by the nineteenth century." *Salazar v. Atlantic Sun*, 881 F.2d 73, 76 (3d Cir. 1989). Supplemental Rule E "applies to actions in personam with process of maritime attachment and garnishment, actions in rem, and petitory, possessory, and partition actions, supplementing Rules B, C, and D." Fed. R. Civ. P. Adm. Supp. R. E(1). Supplemental Rule C sets forth when a party may bring an action in rem. *See* Fed. R. Civ. P. Adm. Supp. R. C(1).

Under maritime law, the withholding of a vessel's departure clearance does not constitute an arrest; rather, it is more akin to a sanction. *See, e.g., Giuseppe Bottiglieri* ***Shipping*** *Co. S.P.A. v. United States*, 843 F. Supp. 2d 1241, 1251 (S.D. Ala. 2012) ("The Coast Guard has not attached or arrested the Vessel, is not seeking forfeiture of the Vessel, or the like; rather, it has simply arranged for the Vessel's customs clearance to be suspended unless and until bond or other surety satisfactory to the Coast Guard is made."); *Wilmina* ***Shipping*** *AS v. United States*, 824 F. Supp. 2d 749, 753 (S.D. Tex. 2010) (observing that the withholding of a departure clearance pursuant to 33 U.S.C. § 1908(e) involves procedures "specific to the APPS statute, and are not supplemented by civil Admiralty Rules governing actions *in rem* and *quasi in rem* jurisdiction"). More recently, the Fourth Circuit Court of Appeals similarly rejected the notion that the Coast Guard's withholding of a vessel's departure clearance constituted an arrest of the vessel for the purposes of admiralty jurisdiction. *Angelex Ltd. v. United States*, 723 F.3d 500, 2013 WL 3782748, at *7-*8 (4th Cir. 2013) ("The Coast Guard is properly withholding the departure clearance pursuant to its authority under § 1908(e), and not pursuant to any rule governing admiralty actions in rem.").

Because the Coast Guard did not arrest the Vessel, and only caused its departure clearance to be withheld, this Court finds that it lacks admiralty jurisdiction over the matter. Although Petitioners argue that the detention of the Vessel amounts to a "*de facto* arrest," this argument lacks merit in light of *Giuseppe Bottiglieri* ***Shipping*** *Co., Wilmina* ***Shipping***, and *Angelex*. None of these cases drew analogies between an arrest of a vessel and the withholding of a departure clearance; rather, they all seem to treat them as two distinct actions. Furthermore, the Supplemental Rules have no application to this case, because they are silent with regards to "customs clearances or the terms under which the Coast Guard and CBP must or may grant them." *Giuseppe Bottiglieri* ***Shipping*** *Co.*, 843 F. Supp. 2d at 1251.

b. Jurisdiction Under 18 U.S.C. 3231

Petitioners argue that this Court has subject matter jurisdiction to review the Coast Guard's actions pursuant to 18 U.S.C. § 3231, because the APPS is a criminal statute. 6 Under 18 U.S.C. § 3231, district courts have "original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

18 U.S.C. § 3231 does not provide subject matter jurisdiction here because the terms and conditions determining when the Vessel may leave the Port of Palm Beach are not criminal matters. "The alleged wrongs by the Coast Guard in [the negotiations over the Security Agreement] are not 'offenses against the laws of the United States' and § 3231 does not create a private right of action (separate and apart from the [Administrative Procedure Act]) for any person who desires judicial interpretation of any federal statute with a criminal component." *Giuseppe Bottiglieri* ***Shipping*** *Co. S.P.A.*, 843 F. Supp. 2d at 1251.

c. Administrative Procedure Act/Federal Question Jurisdiction

Petitioners also contend that the Court has federal question jurisdiction to review the actions of the Coast Guard pursuant to the Administrative Procedure Act ("APA"). "[T]he APA does not provide the Court with an independent basis for subject matter jurisdiction. If at all, subject matter jurisdiction is

proper under the APA only in combination with the Court's federal question jurisdiction under 28 U.S.C. § 1331." *Grinberg v. Swacina*, 478 F. Supp. 2d 1350, 1354 (S.D. Fla 2007). The APA permits judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. If the challenged agency action is not final, then a federal court lacks subject matter jurisdiction over the case. *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1236 (11th Cir. 2003) ("federal jurisdiction is . . . lacking when the administrative action in question is not 'final' within the meaning of 5 U.S.C. § 704."). In order for an agency action to be final, it must "mark the 'consummation' of the agency's decisionmaking process" and must "be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997) (quoting *Port of Boston Marine Terminal Ass'n. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71, 91 S. Ct. 203, 27 L. Ed. 2d 203 (1970)). *In Tennessee Valley Authority v. Whitman*, 336 F.3d 1236 (11th Cir. 2003), the Eleventh Circuit explained:

> The Supreme Court has established five factors for determining finality:
>
> (1) whether the agency action constitutes the agency's definitive position; (2) whether the action has the status of law or affects the legal rights and obligations of the parties; (3) whether the action will have an immediate impact on the daily operations of the regulated party; (4) whether pure questions of law are involved; and (5) whether pre-enforcement review will be efficient.*Whitman*, 366 F.3d at 1248.

Coast Guard regulations refer to a "final agency action" as one that is issued, in writing, by the Assistant Commandant for Marine Safety, Security and Stewardship. *See* 33 C.F.R. § 160.7(d). 33 C.F.R. §§ 160.7(a)-(d) set forth the administrative appeals process an aggrieved party may use if he wishes to challenge an order or direction of the Captain of the Port ("COTP"). First, the party must appeal the COTP's order or direction to the District Commander. 33 C.F.R. § 160.7(b). The party may then appeal the District Commander's ruling to the Area Commander. 33 C.F.R. § 160.7(c). As a last resort, the party may appeal an unfavorable ruling of the Area Commander to the Assistant Commandant for Marine Safety, Security and Stewardship. 33 C.F.R. § 160.7(d).

In *Nimmrich & Prahm Reederei GMBH & Co. KG MS v. United States*, the United States District Court for the Southern District of Texas held that a mere impasse in negotiations over the terms of a bond or other surety did not constitute a "final agency action" under 33 C.F.R. 160.7(d). *Nimmrich & Prahm Reederei GMBH & Co. KG MS v. United States*, 925 F. Supp. 2d 850, 2012 WL 1641009, at*4 (S.D. Tex. 2012). The court explained, "[i]n all, while it appears that the parties were, at time Petitioners filed this action, at a stalemate, such a stalemate does not constitute final agency action for purposes of judicial review under the APA." *Id.*

This Court finds that it does not have subject matter jurisdiction under the APA to review the terms of the Security Agreement proposed by the Coast Guard because there has been no "final agency action." The Assistant Commandant for Marine Safety, Security and Stewardship has not issued a decision in writing. The parties continued their negotiations over the terms of the Security Agreement up to the date of the hearing in this case, although they were unable to reach mutually agreeable terms. Although negotiations have stalled, this does not mean that the Coast Guard has made any sort of final action that signals the "consummation of the agency's decisionmaking process" nor a "definitive statement of [its] position."

Although Petitioners argue that the proposed Security Agreement should constitute final agency action because "the vast majority of the material terms are non-negotiable" and the instrument constitutes an "adhesion contract," they fail to specify which terms are "non-negotiable." This argument is undercut by Petitioners' own actions; the Petitioners engaged in negotiations with the

Coast Guard in an effort to decide upon the terms of the Security Agreement. If any attempt at negotiating the terms of such an "adhesion contract" would have been futile from the outset, then it would make no sense for Petitioners to have made several attempts to do so.

Alternatively, Petitioners argue that, even if this Court *were* to find that the proposed Security Agreement did not constitute a final agency action, it could still exercise subject matter jurisdiction over the dispute for two reasons: (1) because "the legal question is 'fit' for resolution and delay would mean hardship;" and (2) "exhaustion would prove 'futile.'" In support of this proposition, Petitioners cite *Shalala v. Illinois Council on Long Term Care*, 529 U.S. 1, 13, 120 S. Ct. 1084, 146 L. Ed. 2d 1 (2000). This argument lacks merit. The "hardship" and "futility" grounds cited by Petitioners are "exceptions to the general requirement of exhaustion of administrative remedies." *Giuseppe Bottiglieri **Shipping** Co. S.P.A.*, 843 F. Supp. 2d at 1250. Here, Petitioners do not bring their claim under the judicial review provision of the APPS and do not invoke 33 U.S.C. § 1910(a). Therefore, it really makes no difference whether Petitioners were or were not excused from satisfying exhaustion requirements for a claim they never presented in their Amended Petition and Motion. *See id.* at 1251. Petitioners' alternative argument must fail.

VI. Reasonable Cause to Request the Withholding of the Vessel's Departure Clearance

Even if, for the sake of argument, the Security Agreement *did* constitute a final agency action under the APA, this Court would find that the Coast Guard did have reasonable cause to request that the Vessel's departure clearance be withheld in light of the administrative record. Although the term "reasonable cause" is not defined in the APPS, and neither the parties nor this Court has been able to find a case defining the term in the context of the withholding of a vessel's clearance to depart a United States port, in the analogous context of customs searches of incoming mail packages conducted pursuant to 19 U.S.C. § 1582, the Ninth Circuit Court of Appeals explained that the reasonable cause standard is considerably lower than probable cause. *United States v. Taghizadeh*, 87 F.3d 287, 289 (9th Cir. 1996). Under that reasonable cause test, customs "officials may conduct a search so long as they are aware of 'specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the package contains illegal material.'" *Id.* (quoting *United States v. Most*, 789 F.2d 1411, 1415 (9th Cir. 1986)). Additionally, in the criminal context, reasonable cause can exist "when an arresting officer has facts and circumstances within his knowledge which are reasonably trustworthy and which would lead a prudent man to believe that the accused had committed a felony." *United States v. Taylor*, 797 F.2d 1563, 1564 (11th Cir. 1986) (applying Alabama law).

a. In Determining Whether the Coast Guard Had Reasonable Cause, We Are Confined to the Administrative Record

"[T]he focal point for judicial review [of agency action] should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142, 93 S. Ct. 1241, 36 L. Ed. 2d 106 (1973). "The task of the reviewing court is to apply the appropriate APA standard of review . . . to the agency decision based on the record the agency presents to the reviewing court." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743, 105 S. Ct. 1598, 84 L. Ed. 2d 643 (1985). "If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Id.* "The APA specifically contemplates judicial review on the basis of the agency record compiled in the course of informal agency action in which a

hearing has not occurred." *Id.* at 744.

In reviewing the administrative record provided by the Coast Guard, we conclude that the Coast Guard did have reasonable cause to request the withholding of the Vessel's departure clearance. The Port State Control Report of Inspection-Form B, dated June 7, 2013, noted the following:

> "Vessel has a pneumatic pump set up & has modified the discharge side of the OWS piping to discharge oily bilge water directly overboard."
>
> "Chief Engineer does not use the Oil Record Book to record when the vessel is decanting oily water from oil which is discharged directly overboard."
>
> "[D]iscovered evidence indicating the vessel's crew is discharging oily water mixtures collected into the sea using a pneumatic pump and hose configuration straight through to the overboard discharge valve. This unapproved method bypasses the installed oily water separator and does not permit the monitoring of effluent to ensure the oil content discharge overboard does not exceed 15 parts per million. The PSCO also discovered an oil residue/mixture on the overboard discharge side, indicating the crew bypassed the OWS to discharge oily water mixture overboard."
>
> "A substantial amount of oily water was discovered in the bilge. After an expanded examination it was discovered that the #1 seawater pump and the #2 freshwater pump were leaking profusely into the bilge causing crew to discharge excess oily bilge water directly overboard."
>
> "Vessel does not have oil transfer procedures including instructions, diagrams, or checklists."These observations constitute specific, articulable facts which permit a rational inference that the Vessel was in violation of MARPOL and the APPS. We conclude that these numerous alleged violations established reasonable cause and supported the withholding of the Vessel's departure clearance. 7

VII. Whether There Is a Judicially-Manageable Standard with which to Evaluate the Terms of the Security Agreement

The Petitioners argue that the Respondents exceeded their authority under section 1908(e) and acted in an arbitrary and capricious manner by setting an unreasonable bond amount and requesting compliance with excessive or improper non-monetary terms. Even if the proposed Security Agreement did constitute a final agency action under the APA, this Court finds that it could not review the propriety of its terms because, under section 1908(e), the setting of a bond and the imposition of other conditions are decisions committed to the discretion of the United States Coast Guard.

In *Heckler v. Chaney*, 470 U.S. 821, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985), the Supreme Court explained the restrictions placed on judicial review of agency actions pursuant to the Administrative Procedure Act:

> The APA's comprehensive provisions for judicial review of "agency actions," are contained in 5 U.S.C. §§ 701-706. Any person "adversely affected or aggrieved" by agency action; see § 702, including a "failure to act," is entitled to "judicial review thereof," as long as the action is a "final agency action for which there is no other adequate remedy in a court," see § 704. The standards to be applied on review are governed by the provisions of § 706. But before any review at all may be had, a party must first clear the hurdle of § 701(a). That section provides that the chapter on judicial review "applies, according to the provisions thereof, except to the extent that-(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."*Heckler*, 470 U.S. at 828. Section 701(a)(1) "applies when Congress has expressed an

> intent to preclude judicial review." *Id.* at 830. Section 701(a)(2) "applies in different circumstances; even where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute ("law") can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely." *Id.* Section 701(a)(2) "is a very narrow exception." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971). Under the analytical framework set forth in *Heckler*, if the statute falls under 701(a)(2), then the inquiry stops and the court cannot and does not determine whether the agency action constitutes an abuse of discretion. *See Heckler*, 470 U.S. at 830 ("if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'").

In determining whether an agency statute falls under section 701(a)(2), courts will focus on "whether the governing statute provides the courts with 'law to apply.'" *Forsyth Cnty. vs. U.S. Army Corps of Eng'rs*, 633 F.3d 1032, 1040 (11th Cir. 2011). *Heckler* sets forth the following test to determine whether the statute at issue provides courts with law to apply:

> If [the statute] has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is "law to apply" under § 701(a)(2), and courts may require that the agency follow that law; if it has not, then an agency . . . decision [is] "committed to agency discretion by law" within the meaning of that section.*Heckler*, 470 U.S. at 834-35.

The Eleventh Circuit Court of Appeals has held that an agency statute falls within the meaning of section 701(a)(2) when, for example, it sets forth particular factors to guide the agency in reaching a determination or affords broad discretion and does not set forth parameters for determining when the agency's exercise of its discretion is inappropriate. *Forsyth Cnty.*, 633 F.3d at 1041.

In reaching our holding that section 1908(e) is committed to agency discretion, we focus on the following language: "[c]learance *may* be granted upon the filing of a bond or other surety *satisfactory* to the Secretary." 33 U.S.C. § 1908(e) (emphasis added). In *Giuseppe Bottiglieri **Shipping** Co.*, the court noted that

> [o]n its face, this language confers enormously broad discretion on the Coast Guard to decide, in the first place, whether to grant clearance at all (hence the statement that clearance may not "must" or "shall"-be granted) and, if so, on what terms (hence the allowance for bond or other surety "satisfactory to the Secretary"). From the text of § 1908(e), a reviewing court would have no meaningful standard at all against which to judge whether the Coast Guard's exercise of its discretion was appropriate or not. Congress did not require the Coast Guard to accept a bond or other surety in any case. It did not grant an absolute right to a vessel owner to obtain departure clearance. It did not outline (even in the broadest brushstrokes) the parameters for what form or amount a bond or other surety should take. It did not impose a reasonableness limitation on the bond or other surety fixed by the Coast Guard. It did not even specify what a "bond or other surety" is, or clearly bar the Coast Guard from including nonfinancial terms in § 1908(e) surety agreements. A court could not possibly evaluate what is or is not actually "satisfactory" to the Coast Guard, save perhaps by cross-examining the Commandant of the Coast Guard about his own subjective beliefs and perceptions.*Giuseppe Bottiglieri **Shipping** Co. S.P.A.*, 843 F. Supp. 2d at 1248. We adopt the above analysis contained in *Giuseppe Bottiglieri **Shipping** Co.;* under *Heckler*, section 1908(e)'s broad, discretionary language does not afford this Court with a judicially manageable standard with which to evaluate the Coast Guard's actions. It is the Coast Guard's decision as to whether a bond or other surety may be posted in the first instance. It is not

mandatory that the Coast Guard allow for a bond or other surety to be posted. Further, if the Coast Guard decides that a bond or other surety is appropriate in a specific case, it is then entirely within the Coast Guard's discretion as to what terms to require. Because we cannot substitute our judgment for that of the Coast Guard, we cannot evaluate the propriety of the terms of the Security Agreement.

VIII. The Absence of An Appeals Process Specifically Related to the APPS Does Not Mean That Petitioners Are Without a Means of Challenging the COTP's Actions

Petitioners argue that there is no C.F.R. provision which affords an administrative appeal process regarding the Coast Guard's request to withhold the clearance of a vessel pursuant to section 1908(e). Petitioners argue that the administrative appeal procedures under 33 C.F.R. § 160.7 do not authorize an administrative appeal under the APPS.

Respondents assert that 33 C.F.R. § 160.7 is commonly used by the Coast Guard in this type of situation and that it is an appropriate vehicle for the Petitioners to obtain administrative review. Although the Respondents maintain that the Security Agreement does not constitute "final agency action" and Petitioners must use the appeals process set out in 33 C.F.R § 160.7, the Petitioners point out that there is no provision for such review under the APPS, which the Coast Guard has relied upon to prevent the Vessel from obtaining a departure clearance.

The Petitioners maintain that the appeals procedure set out in 33 C.F.R § 160.7 does not apply to the Coast Guard's request to withhold the departure clearance of the Vessel, because this is the appeals procedure used to appeal decisions of the COPT made under the Ports and Waterways Safety Act. In support of their position, the Petitioners cite 33 C.F.R. 160.1(a), which provides, "[t]his subchapter contains regulations implementing the Ports and Waterways Safety Act (33 U.S.C. 1221) and related statutes." Essentially, the Petitioners argue that the withholding of the Vessel's clearance and proposed Security Agreement are not subject to administrative appeal because there is no applicable appeal process set forth in the APPS, and the Respondents cannot accuse the Petitioners of failing to exhaust administrative remedies set forth in 33 C.F.R § 160.7 when they are not the procedures which govern the dispute.

We find that this argument places undue emphasis on "form" over "substance." It would be a stretch to say that there is *no appeals process* available to Petitioners at all, simply because there is not one that specifically applies to the statutory scheme upon which the Coast Guard relies to withhold the Vessel's departure clearance. Although it is true that the Coast Guard is not exercising its authority in this case under the Ports and Waterways Safety Act, 33 C.F.R § 160.1(a) does state that the regulations contained therein apply to the Ports and Waterways Safety Act *and related statutes.* In light of the broad discretion the Coast Guard has in interpreting and implementing its own regulations, we find that it may properly consider the APPS one such related statute. Furthermore, even if the APPS did set forth its own appeals process, it is questionable whether it would differ in any material way from the one already laid out in Rule 160.7. The appeals process set forth in Rule 160.7 affords the Petitioners with a procedure for obtaining meaningful review of the COTP's decision to withhold the Vessel's departure clearance and the terms required for a bond or other surety; the fact that the appeals process just so happens to exist specifically in reference to a related statute is of no consequence.

IX. Mandamus Jurisdiction

In their response to the Respondents' Motion to Dismiss, Petitioners for the first time contend that the Court has mandamus jurisdiction. Pursuant to 28 U.S.C. § 1361,

> The district courts shall have original jurisdiction of any action in the nature of mandamus to

> compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.Mandamus is, and has long been, an extraordinary remedy in the federal courts. *Cash v. Barnhart*, 327 F.3d 1252, 1257 (11th Cir. 2003); *In re United States*, 985 F.2d 510, 511 (11th Cir. 1993). "Mandamus jurisdiction is appropriate only where (1) the defendant owes a clear nondiscretionary duty to the plaintiff and (2) the plaintiff has exhausted all other avenues of relief." *Lifestar Ambulance Serv., Inc. v. United States*, 365 F.3d 1293, 1295 (11th Cir. 2004) (citing *Heckler v. Ringer*, 466 U.S. 602, 615, 104 S. Ct. 2013, 80 L. Ed. 2d 622 (1984)) (footnote omitted). "[M]andamus jurisdiction does not lie merely because resort to the administrative process appears futile." *Id.* at 1297. Moreover, "[t]o ensure that mandamus remains an extraordinary form of relief and not a strategy for avoiding administrative exhaustion, plaintiffs must clearly demonstrate that they have no alternative means to obtain the relief they seek." *Id.* at 1298.

As demonstrated by the discussion above, this Court is not convinced that the Respondents owe a clear, *nondiscretionary* duty to Petitioners, and Petitioners have failed to show that they have exhausted *all* other avenues of relief. Petitioners have not appealed the decision of the Captain of the Port through the channels prescribed by Rule 160.7. It is clear from the Respondents' submissions that the Coast Guard does in fact have a process in place for the administrative review of APPS-related decisions. Even accepting Petitioners' position that Respondents rely on the wrong regulations, they nonetheless have *some* avenue of relief in appealing through the Coast Guard's internal review mechanisms. Because Petitioners have not exhausted "all other avenues of relief," the Court does not have mandamus jurisdiction.

This Court is not unsympathetic to Petitioners' plight. Petitioners own two ships and one of them, the M/V **Monarch** Empress, is sitting in the Port of Palm Beach earning no revenue. Petitioners have also been subjected to lawsuits and loss of revenue because of the inability of the M/V **Monarch** Empress to deliver cargo to, and receive cargo from, other ports. However, the pollution of the oceans and waterways is a serious matter and the Coast Guard has a statutory duty and obligation to investigate violations of the applicable statutes. Petitioners have not cited, and this Court has not found, one federal case in which the relief sought by Petitioners was granted by a federal court; the closest this Court found was *Angelex*, in which the District Court granted such relief, but that relief was subsequently stayed and then reversed by the Fourth Circuit Court of Appeals. *Angelex Ltd.*, 723 F.3d 500, 2013 WL 3782743 at *8. There is simply no legal support for Petitioners' Amended Petition and Motion.

X. Conclusion

For the foregoing reasons, it is respectfully recommended that the Amended Petition and Motion [DE 10] be **DENIED** and **DISMISSED.**

NOTICE OF RIGHT TO OBJECT

A party shall file written objections, if any, to this Report and Recommendation with United States District Judge Kenneth A. Marra within fourteen (14) days of being served with a copy of this Report and Recommendation. *See* 28 U.S.C. § 636(b)(1)(C).

RESPECTFULLY SUBMITTED in Chambers at West Palm Beach, Palm Beach County, Florida, this 15th day of August, 2013.

/s/ William Matthewman

WILLIAM MATTHEWMAN

UNITED STATES MAGISTRATE JUDGE

Footnotes

1

A port state control inspection is "the inspection of foreign ships in national ports to verify that the condition of the ship and its equipment comply with the requirements of international regulations and that the ship is manned and operated in compliance with these rules." Int'l Maritime Org., *Port State Control*, (accessed July 19, 2013).

2

"'Bilge water'" is the mixture of oil and water that accumulates in the 'bilge'-or bottom-of a ship." *United States v. Pena*, 684 F.3d 1137, 1147 n.2 (11th Cir. 2012).

3

According to the Respondents, none of these 30 discharges were recorded in the oil record book. [DE 20-3, p. 12].

4

The language of the APPS speaks of the Secretary of *the Treasury* being responsible for the withholding and revocation of clearance. 33 U.S.C. § 1908(e). In 2002, many of the Treasury Secretary's functions, including the Customs Service, were reassigned to the Secretary of Homeland Security. 6 U.S.C. § 203. It is recognized elsewhere that it is the Secretary of Homeland Security's job to issue departure clearances. *See, e.g.*, 46 U.S.C. § 60105. The parties do not question that this is simply a Congressional oversight.

5

Respondents mount a facial challenge to subject matter jurisdiction. [DE 18, p. 7].

6

Although Petitioners raise this argument in their pleadings, they abandoned it at the evidentiary hearing.

7

Although Petitioners offered evidence during the July 24th hearing in an effort to show that they had committed no such violations, this Court's review is limited to the administrative record. Moreover, the testimony and evidence presented by the Petitioners does not negate the fact that the Coast Guard had reasonable cause to justify its actions.